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No. 85-1389

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

LONE PINE STEERING COMMITTEE, ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. (& Supp. I) 9601 *et seq.*, authorizes potentially responsible parties to delay the Environmental Protection Agency's clean-up of hazardous waste sites by litigating their liability prior to or during an agency-conducted clean-up, or whether potentially responsible parties must instead await EPA's initiation of an enforcement action, such as cost-recovery litigation under 42 U.S.C. (& Supp. I) 9607, to raise their challenges to the agency's clean-up actions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-14a) is reported at 777 F.2d 882. The opinion of the district court (Pet. App. 15a-39a) is reported at 600 F. Supp. 1487.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a) was entered on November 22, 1985. The petition for a writ of certiorari was filed on February 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, five corporations that organized themselves into the Lone Pine Steering Committee (Steering Committee), filed this action for declaratory and injunctive relief, seeking to block the Environmental Protection Agency's

implementation of a proposed remedial plan to clean up the Lone Pine landfill in Freehold, New Jersey. EPA moved to dismiss petitioners' complaint on the ground that pre-enforcement review of the agency's hazardous waste clean-up actions is not authorized by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. (& Supp. I) 9601 *et seq.*[1] The district court agreed with EPA, and the court of appeals affirmed.

1. Congress enacted CERCLA in 1980 in response to increasing concern over the serious environmental and public health effects stemming from improper disposal of hazardous and toxic substances. Under pre-existing statutes, EPA had some authority to bring suit to require clean-ups, but the agency lacked the authority either to conduct clean-ups itself or to compel private parties to conduct clean-ups without litigation. See *United States* v. *Price*, 577 F. Supp. 1103, 1109 (D.N.J. 1983). CERCLA was designed to address the deficiencies in these earlier statutes by ensuring that clean-up actions would precede litigation. See S. Rep. 96-848, 96th Cong., 2d Sess. 10-12 (1980).

CERCLA authorizes EPA to effectuate clean-ups in several ways. Section 221(a) of the Act, 42 U.S.C. 9631(a), set up a Fund (the Superfund) through which EPA can finance government-conducted clean-ups. Section 104 of

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[1]By the term "pre-enforcement review," we mean any judicial review prior to the time EPA files suit to recover response costs under 42 U.S.C. (& Supp. I) 9607, or to enforce an administrative order under 42 U.S.C. 9606, or to recover civil penalties or damages under 42 U.S.C. 9606 or 42 U.S.C. (& Supp. I) 9607. In the instant case, enforcement will most likely occur when EPA files suit to recover response costs under 42 U.S.C. (& Supp. I) 9607. Thus, the parties and the courts below focused their attention on the availability (or lack thereof) of judicial review before EPA's initiation of cost-recovery litigation.

the statute, 42 U.S.C. 9604, permits the agency to conduct "response actions" (*i.e.*, clean up a site) in the case of releases or threatened releases of hazardous substances. Response actions include a variety of investigative, evaluative, and clean-up activities, and they may involve either short-term "removal" actions or longer-term "remedial" actions designed to effect a permanent remedy. See 42 U.S.C. 9601(23), (24) and (25). Section 104(a)(1) of CERCLA, which describes the various response actions available to EPA, draws no distinction between the agency's authority to take removal and remedial actions.

Guiding EPA's response actions is the revised National Contingency Plan (NCP), 40 C.F.R. Pt. 300, required by Section 105 of CERCLA, 42 U.S.C. 9605. The NCP sets forth methods for discovering and investigating sites at which hazardous substances have been located, methods for remedying releases of hazardous substances, and criteria for determining the appropriate extent of response activities.

Agency clean-ups are funded initially through the Superfund, but EPA may file suit against responsible parties to recover clean-up costs not inconsistent with the NCP. Section 107 of CERCLA, 42 U.S.C. (& Supp. I) 9607. Thus, response actions under Section 104 of CERCLA, 42 U.S.C. 9604, are to precede litigation. The legislative history underscores Congress's intent to empower EPA to take prompt action without the delays inherent in pre-response litigation. In discussing EPA's ability to undertake response actions, the Senate Committee stressed the fact that clean-up delays worsen already serious situations and declared that, if any errors were to be made, the agency should (S. Rep. 96-848, *supra,* at 56)

err on the side of protecting public health, welfare and the environment in administering the response authority of the Fund.[2]

2. The instant case concerns EPA's efforts to clean up the Lone Pine landfill, located in Freehold, New Jersey. The landfill, ranked 19th on the National Priorities List, a list of the most serious hazardous waste sites, 40 C.F.R. Pt. 300, App. B, has consistently ranked among the 50 worst sites in the country. The landfill began operations in 1959 and, after a June 1978 chemical fire, was closed to further waste disposal in 1979. At least 17,000 drums containing chemical wastes and several million gallons of bulk liquid hazardous wastes were dumped at the landfill.[3]

In 1981 and 1982, EPA and the New Jersey Department of Environmental Protection (NJDEP) conducted various studies to determine the extent of contamination at the landfill. These studies confirmed the contamination by hazardous substances of both the surficial Vincentown aquifer and the deeper Red Bank aquifer. Hazardous substances located at the site include benzene, chlorobenzene, methyl chloride, toluene, and vinyl chloride. These

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[2]As an alternative to EPA-conducted clean-ups under Section 104, Section 106 of CERCLA, 42 U.S.C. 9606, authorizes the agency to issue administrative orders compelling private parties to conduct clean-ups whenever releases or threatened releases of hazardous substances create an "imminent and substantial endangerment" to health or the environment. This Section also permits the Attorney General to bring injunctive actions to abate such dangers. *Ibid.*

[3]Testimony, depositions, and other evidence in two separate cases confirmed the disposal of these vast quantities of hazardous substances. *United States* v. *Case,* No. 82-2000 (D. N.J. May 25, 1983), aff'd, No. 83-546 (3d Cir. Apr. 16, 1984), cert. denied, No. 83-6952 (Nov. 26, 1984); *New Jersey Dep't of Environmental Protection* v. *Lone Pine Corp.,* No. C-956-79 (N.J. Super. Ct. filed Oct. 25, 1979).

compounds, found in substantially high levels at the landfill, are toxic and carcinogenic.[4]

EPA sent notice letters to several companies, including petitioners, in July and September 1982, informing them that they might be potentially responsible parties and inviting them voluntarily to conduct a feasibility study that would evaluate remedial alternatives for the landfill.[5] No company came forward to undertake the required work.

EPA therefore conducted the feasibility study itself, releasing a three-volume draft study in June 1983. The study reviewed several remedial alternatives, ranging from no action to total excavation of the landfill. A public meeting was held to discuss the draft study on June 24, 1983. At the meeting, EPA expressed a preference for a plan that included a clay cap over the landfill, construction of an underground slurry wall to contain the contamination, and pumping and treatment of contaminated groundwater. The Steering Committee, represented by counsel at the meeting, presented a proposal in a June 29, 1983 letter to EPA. The

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[4]Petitioners assert (Pet. 4, 5) that only low levels of contamination were found at the landfill. In fact, EPA's Record of Decision is replete with references to the "severe" and "significantly high" levels of contamination. See, *e.g.*, C.A. App. 1196-1197, 1213, 1216, 1232-1233.

[5]The formal EPA policy referred to by petitioners (Pet. 3-4) was not in effect in 1982, when the first round of notice letters was sent. Depositions taken earlier in 1982 in *New Jersey Dep't of Environmental Protection* v. *Lone Pine Corp.*, No. C-956-79 (N.J. Super. Ct. filed Oct. 25, 1979), had identified several of the 15 companies that received the first notice letters from EPA. The Steering Committee had access to the depositions, which were public records. In addition, EPA repeatedly requested from the Steering Committee any information concerning other potentially responsible parties, asking for such information in June, October, and December 1983. C.A. App. 212, 215, 989. The Steering Committee never responded to EPA's repeated requests and was unwilling to tell the agency the identities of the Committee members. C.A. App. 69.

Committee's proposal called for a clay cap and monitoring at the landfill to detect conditions that might make further response actions necessary.[6]

After considering comments on the draft feasibility study, including comments from petitioners, EPA released a supplemental feasibility study in June 1984. This study reaffirmed the three-part plan initially proposed by EPA. The supplemental study noted that, although capping would reduce contamination somewhat, it would not prevent further contamination. EPA held an additional public meeting on August 1, 1984, at which the Committee essentially reoffered its own remedial plan. This plan, the substance of which had been conveyed to EPA earlier (see note 6, *supra*), called for a clay cap and a monitoring program with additional response to occur if conditions at the landfill deteriorated further.[7]

In September 1984, EPA sent notice letters to approximately 142 companies, including petitioners, that it had by then identified as potentially responsible parties. EPA

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[6]Thus, despite petitioners' contentions (Pet. 8, 15), the Committee's plan was first proposed to EPA in June 1983, not in September 1984. It is simply not true that EPA gave the Committee's plan "all of two days' 'consideration' " (Pet. 15) before issuing its Record of Decision. Indeed, the district court commented on the Committee's "distorted version of the true state of affairs" (Pet. App. 31a). The court noted that "[w]hat in fact happened was that since July 1982 EPA had been discussing with the corporate plaintiffs and others the best way to deal with the Lone Pine menace" (*id.* at 32a). The court of appeals also recognized that the Committee had presented its plan to EPA in June 1983 (*id.* at 4a).

[7]In addition to the public meetings during 1982, 1983, and 1984, EPA met with the Committee on five occasions and with officials of the corporate petitioners on three other dates. C.A. App. 1049, 1401-1407. Throughout 1983 and 1984, EPA and its consultants were available for meetings and discussions with the Committee and its members. Furthermore, EPA and its consultants opened their files and provided technical data for review by petitioners. C.A. App. 206-218. EPA flew its consultants to New York for a meeting with petitioners and responded in writing to petitioners' concerns. C.A. App. 1012-1050.

invited the companies to undertake voluntarily the remedial clean-up proposed by EPA, in lieu of a Superfund-financed agency clean-up. The notice letters requested the companies to respond to the agency's request for voluntary clean-up by September 26, 1984.

No company volunteered to undertake any part of the clean-up. Instead, the Committee's September 26, 1984 response offered only what the district court termed "a beefed up version of the Committee's [earlier] proposal" (Pet. App. 32a). The cover letter accompanying the Committee's response made it clear that the Committee was not even firmly offering to undertake its own proposed limited measures.[8]

On September 28, 1984, EPA's Assistant Administrator signed the agency's 434-page Record of Decision (ROD).[9]

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[8]As the district court noted (Pet. App. 32a), the Committee did not present its cover letter to the district court along with its plan. Rather, EPA brought the Committee's "non-offer" cover letter to the district court's attention. That letter, which the district court termed "a masterpiece of studied avoidance of commitment" (*id.* at 33a), stated (*id.* at 27a (emphasis added by district court)):

> While this letter and the enclosed Action Plan constitutes the response of the members of the Lone Pine Steering Committee to EPA's letter of September 12, 1984, by describing the nature and extent of corrective measures which we *may* be willing to undertake at Lone Pine, we would emphasize that the Steering Committee has consistently taken the position that the financial responsibility for implementing remedial action at Lone Pine *must* be shared by *all* parties who operated, used or whose wastes were disposed of at Lone Pine. Accordingly, the Action Plan is presented as the basis for a comprehensive negotiated settlement by all responsible parties (whether or not identified to date by EPA) and *should not be viewed as a commitment to undertake this program in the absence of such a* [negotiated settlement].

[9]Petitioners' inclusion in the appendix to the petition (Pet. App. 40a-42a) of only the first three pages of the ROD conveys the erroneous impression that the ROD was in fact a three-page document. Actually, the ROD comprised 434 pages. Moreover, the ROD itself constituted

The ROD confirmed the presence of significantly high levels of contamination in the aquifers and groundwater.[10] The remedial plan described in the ROD included a clay cap, underground slurry wall, and pumping and treatment of the contaminated groundwater. This plan, unlike that proposed by the Committee, totally controls the source of contamination.

3. In October 1984, petitioners filed this suit in the United States District Court for the District of New Jersey, seeking to block implementation of EPA's remedial plan. The district court dismissed petitioners' complaint, ruling that CERCLA does not authorize pre-enforcement review of EPA's remedial clean-up actions, and the court of appeals affirmed. Both courts reviewed the language of the statute, its objectives, its legislative history, and the nature of the challenged agency action. Both concluded that the pre-enforcement judicial review sought by petitioners would frustrate the central purpose of CERCLA—prompt clean-ups first, liability litigation later. Both courts also concluded that petitioners could raise their objections to the

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only a portion of the documents EPA relied upon in determining the appropriate remedial response. The entire administrative record in this case is over 4,200 pages.

[10]Groundwater samples indicated concentrations of volatile organic compounds far in excess of the levels established by NJDEP for closure of drinking water wells and far beyond exposure levels based on unit cancer risk (UCR) values set by EPA for drinking water. The groundwater concentration of benzene was 2,881 times the UCR level, the concentration of 1,2-Dichloroethane was 1,749 times the UCR level, and the concentration of 1,1-Dichloroethane was 2,908 times the UCR level. C.A. App. 1232. In addition, considerable quantities of leachate are oozing from the landfill into the nearby Manasquan River. And, despite petitioners' unsupported assertion to the contrary (Pet. 5), EPA was concerned about the effect of the contamination on the drinking water reservoir planned for a site 16 miles downstream of the landfill. C.A. App. 1233.

remedial plan selected by EPA in any subsequent cost-recovery action that the agency may bring under Section 107 of CERCLA.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners first argue (Pet. 13-16) that CERCLA permits pre-enforcement review. But this Court has recently ruled that the presumption favoring judicial review "is just that—a presumption." *Block* v. *Community Nutrition Institute,* 467 U.S. 340, 349 (1984). Thus, the availability of judicial review is determined not only by the express language of the statute, but also by the structure of the statutory scheme, its objectives and legislative history, and the nature of the administrative action involved. *Community Nutrition Institute,* 467 U.S. at 345. See also *FTC* v. *Standard Oil Co.,* 449 U.S. 232 (1980).

CERCLA expressly provides for judicial review at the cost-recovery stage under Section 107, 42 U.S.C. (& Supp. I) 9607, when EPA sues for abatement under Section 106(a), 42 U.S.C. 9606(a), or when the agency seeks to recover penalties under Section 106(b), 42 U.S.C. 9606(b). If Congress had intended judicial review to precede clean-up, it would have so provided.[11] Instead, the entire structure

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[11]Section 113(b) of CERCLA, 42 U.S.C. 9613(b), relied upon by petitioners (Pet. 13-14), does give district courts jurisdiction over controversies arising under CERCLA. But that provision cannot be read to create a cause of action for pre-enforcement review when such a cause of action would frustrate the statutory scheme established by Congress.

We note that Congress is currently considering legislation to amend CERCLA. Under the Senate bill, S. 51, 99th Cong., 1st Sess. (1985), no pre-enforcement review would be permitted. The House bill, H.R. 2817, 99th Cong., 1st Sess. (1985), would permit judicial review in certain circumstances, none of which would apply in this case.

of CERCLA supports the conclusion that the determination of liability is to come after clean-up. Indeed, the necessity under pre-existing law to determine liability before clean-up was a major factor hampering effective response actions. CERCLA was enacted to remedy exactly this situation. As previously noted (see pages 2-4, *supra*), the legislative history also supports this reading of CERCLA. Congress expressly recognized that "delay will often exacerbate an already serious situation * * *." S. Rep. 96-848, *supra,* at 56.

Moreover, the nature of the administrative action here calls for prompt clean-up without the delay entailed by pre-enforcement judicial review.[12] Contrary to petitioners' apparent position, Congress drew no distinction between "removal" and "remedial" actions for purposes of judicial review. Both types of actions are described in Section 104, 42 U.S.C. 9604, and both are labeled "response" actions.[13]

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[12]Petitioners maintain (Pet. 10), as they did below, that pre-enforcement judicial review would not hamper the clean-up in this case. Petitioners assert that the clay cap can be constructed while a court rules on the other aspects of EPA's plan. Yet, under the remedial plan adopted by EPA, construction of the clay cap will not be the first step undertaken. Moreover, as the court of appeals observed, "[a]lthough [petitioners] assert that the remedial action contemplated here could be performed as litigation continues, that may not always be true in other situations. The legal question of when judicial review is available should not depend on the peculiar facts of each case" (Pet. App. 9a).

In addition, and contrary to petitioners' assertions (Pet. 10-11), the issue of injunctive relief was before both the district court (see Pet. App. 16a-17a) and the court of appeals (*id.* at 12a). Petitioners contend (Pet. 9-10) that they dropped their claim for injunctive relief while the case was pending before the district court. What petitioners dropped was their request for a temporary restraining order. Not only did they continue to seek injunctive relief before the district court, they moved in that court (although not in the court of appeals) for a stay pending appeal. Thus, the court of appeals was not at all "confused" (see Pet. 11 n.14) about the relief sought by petitioners.

[13]Petitioners equate removal actions with "emergency" actions and refer to remedial actions as "non-emergencies" (Pet. 12-13). This

Judicial review of both is discussed only in Section 106(a) (abatement actions); Section 106(b) (actions for penalties); Section 107 (cost-recovery actions); and Section 107(c)(3) (treble damages proceedings). Congress intended EPA to act as promptly as possible in both removal and remedial actions. See *Eagle-Picher Industries, Inc.* v. *EPA*, 759 F.2d 922, 935 (D.C. Cir. 1985) (court recognized need for quick action even in remedial situations, stating: "[W]e simply observe the obvious—the fact that a situation does not constitute an emergency by no means suggests that rapid response is not desirable.").

In sum, the Third Circuit correctly analyzed the statutory scheme when it concluded that CERCLA does not permit pre-enforcement judicial review. The court of appeals' opinion is consistent with a unanimous line of decisions from other courts holding that CERCLA precludes pre-enforcement review, and petitioners have failed to present any plausible arguments in support of a contrary result.[14] See *Wheaton Industries* v. *United States Environmental Protection Agency*, 781 F.2d 354 (3d Cir. 1986); *J.V. Peters & Co.* v. *Administrator, EPA*, 767 F.2d 263 (6th Cir. 1985); *Wagner Seed Co.* v. *Daggett*, No. 86-CV-97 (E.D.N.Y. Jan. 27, 1986), appeal pending, No. 86-6032 (2d Cir.); *Solid State Circuits, Inc.* v. *EPA*, 23 Env't Rep. Cas. (BNA) 1758 (W.D. Mo. 1985); *Wagner Electric Corp.* v. *Thomas*, 612

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distinction is nowhere to be found in the statute. In light of the possible effects of unchecked toxic waste disposal, delay must be avoided regardless of whether the appropriate response is a removal action, which can be carried out quickly, or a remedial action, which is designed to effect a long-term remedy.

[14]Petitioners cast themselves as the guardians of the Superfund established by Section 221 of CERCLA, 42 U.S.C. 9631 (Pet. 12-14). If petitioners were truly concerned about depletion of the Fund, they could easily have responded affirmatively to EPA's invitation voluntarily to conduct the feasibility study in 1982 or voluntarily to undertake the clean-up in 1984. In fact, however, the Committee did not even offer to undertake its own limited clean-up plan (see page 7 & note 8, *supra*).

F. Supp. 736 (D. Kan. 1985); *United States* v. *United Nuclear Corp.*, 610 F. Supp. 527 (D.N.M. 1985); *United States* v. *Outboard Marine Corp.*, 104 F.R.D. 405 (N.D. Ill. 1984), appeal pending, No. 85-1584 (7th Cir.); *United States* v. *Reilly Tar & Chemical Corp.*, 606 F. Supp. 412 (D. Minn. 1985); *Aminoil, Inc.* v. *EPA*, 599 F. Supp. 69 (C.D. Cal. 1984); *Earthline Co.* v. *Kin-Buc, Inc.*, 21 Env't Rep. Cas. (BNA) 2161 (D.N.J. 1984).[15]

2. Petitioners also ask (Pet. 16-19) the Court to decide what defenses a party may assert in a Section 107 cost-recovery action. Consideration of that issue, should it ever be required, should be undertaken only in the context of an actual cost-recovery case. No such action has been filed against petitioners, and petitioners' attempt to raise the matter now is simply a request for an advisory opinion. Nevertheless, we briefly address petitioners' argument.

There is no "disarray" (Pet. 17) among the lower federal courts concerning the arguments that defendants may raise in a cost-recovery action. The courts are in agreement that Section 107 of CERCLA imposes strict liability on responsible parties and limits permissible defenses to those specified in Section 107(b), 42 U.S.C. 9607(b) (acts of God, acts of war, or acts or omissions of certain third parties). See, *e.g.*, *New York* v. *Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States* v. *Wade*, 577 F. Supp. 1326, 1335-1336 (E.D. Pa. 1983); *United States* v. *Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1117-1118 (D. Minn. 1982). This much petitioners do not dispute (see Pet. 12). Nevertheless, petitioners argue that Section 107(a)(4)(A) of CERCLA, 42 U.S.C. 9607(a)(4)(A), which establishes a necessary predicate for liability in any cost-recovery action

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[15]In addition to the Seventh Circuit's expected consideration of the issue in *Outboard Marine*, No. 85-1584, the issue is also pending before the Ninth Circuit in *Time Oil* v. *Barnes*, Nos. 86-3506 and 86-7-40.

initiated by EPA, does not mean what it says. That subsection provides that a responsible party is liable only for (emphasis added)

> all costs of removal or remedial action incurred by the United States Government or a State *not inconsistent with the national contingency plan.*

In any subsequent cost-recovery action, therefore, petitioners may offer proof that the costs claimed by EPA for the Lone Pine clean-up are inconsistent with the National Contingency Plan. Courts have permitted defendants in cost-recovery actions to offer proof that costs were incurred inconsistently with the NCP. See *Shore Realty,* 759 F.2d at 1041, 1043; *United States* v. *Northeastern Pharmaceutical & Chemical Co.,* 579 F. Supp. 823, 850-851 (W.D. Mo. 1984), appeal pending, No. 84-1837 (8th Cir.). Rather than foreclosing consideration of the consistency issue, these courts have simply rejected on the merits defendants' arguments of inconsistency. See also *Ohio ex rel. Brown* v. *Georgeoff,* 562 F. Supp. 1300, 1314 (N.D. Ohio 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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